

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

YOLANY PADILLA, *et al.*,

Plaintiffs-Petitioners,

v.

U.S. IMMIGRATION AND CUSTOMS  
ENFORCEMENT, *et al.*,

Defendants-Respondents.

Case No. 2:18-cv-00928-MJP

**PLAINTIFFS' RESPONSE TO  
DEFENDANTS' MOTION TO  
DISMISS THIRD AMENDMEND  
COMPLAINT**

Noted on Motion Calendar:  
June 21, 2019

ORAL ARGUMENT REQUESTED

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## INTRODUCTION

This Court already has rejected nearly all the arguments Defendants advance in their motion to dismiss, Dkt. 136, including their Rule 12(b)(1) and (6) claims that Plaintiffs and class members do not possess procedural due process rights to prompt credible fear interviews and subsequent bond hearings with procedural protections. Dkt. 91 (order denying motion to dismiss second amended complaint); Dkt. 100 (order denying motion to reconsider). As such, all that remains before this Court to decide on this motion is whether Defendants can eliminate bond hearings and in so doing, avoid giving effect to this Court's prior order affording preliminary injunctive relief to ensure expeditious bond hearings with procedural safeguards. Because Plaintiffs have a constitutional and statutory right to bond hearings, they have stated claims upon which this Court can grant relief. The Court should deny Defendants' motion.

## BACKGROUND

Plaintiffs' Second Amended Complaint, filed on August 22, 2018, alleged that Defendants violate Plaintiffs' rights to timely credible fear interviews and to prompt bond hearings with the necessary procedural protections. Dkt. 26 ¶¶ 128, 137, 146-165. On September 18, 2018, former Attorney General Sessions self-certified the question of whether the Board of Immigration Appeals (BIA) decision in *Matter of X-K-*, 23 I. & N. Dec. 731 (BIA 2005)—which recognized that individuals like Plaintiffs are entitled to bond hearings before an immigration judge—"should be overruled." *Matter of M-G-G-*, 27 I. & N. Dec. 469 (A.G. 2018); *see also* *Matter of M-S-*, 27 I. & N. Dec. 476 (A.G. 2018) (certifying the same issue on October 12, 2018). Neither former Attorney General Sessions nor his successors immediately ruled upon the case.

In the intervening months, this Court denied in part Defendants' motion to dismiss, permitting Plaintiffs' to proceed with their constitutional claims and Administrative Procedure Act (APA) claim regarding procedural rights in bond hearings. *See* Dkt. 91. The Court subsequently certified two nationwide classes. Dkt. 102 at 2. On April 5, 2019, the Court granted

1 Plaintiffs’ motion for a preliminary injunction for the Bond Hearing Class, recognizing that class  
 2 members have “[a] constitutional right to press their due process claims, including their right to  
 3 be free from indeterminate civil detention, and their right to have the bond hearing conducted in  
 4 conformity with due process.” Dkt. 110 at 7.

5 Eleven days after this Court ordered preliminary injunctive relief, Defendant Barr issued  
 6 a decision in *Matter of M-S-*. That decision overruled *Matter of X-K-* and interpreted 8 U.S.C.  
 7 § 1225(b)(1)(B)(ii) to hold that *all* noncitizens “transferred from expedited to full proceedings  
 8 after establishing a credible fear are ineligible for bond,” but delayed implementation of the  
 9 order for 90 days, until July 15, 2019. 27 I. & N. Dec. at 519 & n.8. Subsequently, Defendants  
 10 filed a motion to vacate the preliminary injunction based upon *Matter of M-S-*. See Dkt. 114.

11 On May 5, 2019, Plaintiffs filed a Third Amended Complaint, Dkt 130, which  
 12 Defendants now seek to dismiss, Dkt. 136. Plaintiffs also filed a motion to modify the existing  
 13 preliminary injunction to address *Matter of M-S-*. Dkt. 131. The Court granted the parties’  
 14 stipulated motion to stay the enforcement of the preliminary injunction until July 1, 2019,  
 15 allowing the parties time to complete briefing on their respective motions. Dkt. 129.

### 16 ARGUMENT

17 To prevail on their facial jurisdictional challenges, Defendants must demonstrate that  
 18 Plaintiffs’ allegations “are insufficient on their face to invoke federal jurisdiction.” *Safe Air for*  
 19 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). As for the factual challenge, this Court  
 20 may grant Defendants’ motion only if “there is no genuine dispute as to any material fact”  
 21 regarding the jurisdictional issues. Fed. R. Civ. P. 56(a); *see also Leite v. Crane Co.*, 749 F.3d  
 22 1117, 1121-22 (9th Cir. 2014). As for Defendants’ motion under Rule 12(b)(6), Plaintiffs need  
 23 only show that the “complaint . . . contain[s] sufficient factual matter . . . to state a claim to relief  
 24 that is plausible on its face.” *Bain v. California Teachers Ass’n*, 891 F.3d 1206, 1211 (9th Cir.  
 25 2018) (citation omitted). In conducting the Rule 12(b)(6) inquiry, the Court “presumes that the  
 26 facts alleged by the plaintiff are true . . . [and] draw[s] all reasonable inferences from the

complaint in [the plaintiff's] favor.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247-48 (9th Cir. 2013) (internal quotation marks omitted).

### **I. The Bond Hearing Class Claims Are Not Moot.**

The Bond Hearing Class claims are not moot for two reasons. First, although Plaintiffs Vasquez and Padilla were released on bonds set by an immigration judge (IJ), they continue to “have a concrete interest” in this case, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks and citation omitted), because they face re-detention without a constitutionally adequate bond hearing as a result of *Matter of M-S-*. See Dkt. 130 ¶¶ 67, 97, 117-29. “As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Chafin*, 568 U.S. at 172 (citation omitted). Moreover, as this Court has already recognized, Plaintiffs’ challenges to detention pending removal proceedings are “inherently transitory” and therefore subject to the “capable of repetition yet evading review” exception to mootness. Dkt. 102 at 8 (citing *Rivera v. Holder*, 307 F.R.D. 539, 548 (W.D. Wash. 2015)).

Defendants may revoke an IJ’s bond order at any time based on changed circumstances. See 8 U.S.C. § 1226(b); 8 C.F.R. § 1236.1(c)(9). Defendants claim that *Matter of M-S-* is a changed circumstance that eliminates Plaintiffs’ eligibility for a bond hearing, *see, e.g.*, Dkt. 114 at 10, rendering their bond orders void *ab initio*. If and when their bonds are revoked, Plaintiffs will be detained without any bond hearing—much less a prompt bond hearing that comports with due process. Thus, Plaintiffs continue to have a concrete stake in the outcome of this litigation, and their claims are not moot. For the same reason, Plaintiffs remain adequate class representatives. See *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997).

Nonetheless, citing a declaration by Russell Holt, Acting Deputy Assistant Director of Enforcement and Removal Operations for Immigration and Customs Enforcement (ICE), Defendants assert that Plaintiffs’ claims are moot because ICE does not intend to re-detain individuals like Plaintiffs, who received bond hearings pursuant to *Matter of X-K-*. See Dkt. 136 at 5. Significantly, however, Mr. Holt states only that ICE does not intend to re-detain such

1 individuals “[a]t this time,” Dkt. 137 ¶ 6 (emphasis added). Defendants omit that qualifier when  
 2 discussing Mr. Holt’s statement in their brief.

3 This vague and noncommittal assertion does meet Defendants’ “formidable burden” to  
 4 show that its voluntary cessation makes it “*absolutely clear* the allegedly wrongful behavior  
 5 could not reasonably be expected to recur.” *Friends of the Earth v. Laidlaw Env’tl. Servs. (TOC),*  
 6 *Inc.*, 528 U.S. 167, 189-90 (2000) (emphasis added). Mr. Holt’s statement “does not suggest that  
 7 it is binding . . . , nor would [such a statement] typically create legal obligations.” *Porter v.*  
 8 *Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007). Courts have repeatedly declined to find detention  
 9 claims moot where, as here, the government maintains it retains discretion to return an individual  
 10 to custody. *See, e.g., Abdi v. Duke*, 280 F. Supp. 3d 373, 395 (W.D.N.Y. 2017) (case not moot  
 11 because ICE’s stated intent not to re-detain noncitizen “at this time” “[left] open the possibility  
 12 that Respondents could, on a whim, change course and decide to re-detain”); *Centeno-Ortiz v.*  
 13 *Culley*, No. 11-cv-1970-IEG, 2012 WL 170123, at \*4-5 (S.D. Cal. Jan. 19, 2012) (same, where  
 14 government “refuse[d] to disclaim its authority to detain Petitioner” and instead reserved  
 15 discretion to re-detain if “required by law”); *see also Clark v. Martinez*, 543 U.S. 371, 376 n.3  
 16 (2005) (same, where former detainee’s release was “subject to the Secretary’s discretionary  
 17 authority to terminate”). *Compare Pircin–Peron v. Rison*, 930 F.2d 773, 776 (9th Cir. 1991)  
 18 (case moot where there was no reasonable likelihood of re-detention because the specified  
 19 conditions for re-detention were outside the government’s control). Defendants argue that  
 20 *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), shows Plaintiffs lack a concrete  
 21 injury for standing, *see* Dkt. 136 at 5, but *Clapper* does not address the voluntary cessation  
 22 exception to mootness.

23 Nor is the risk of Plaintiffs’ re-detention speculative, as Defendants claim. *See* Dkt. 136  
 24 at 5. *Matter of M-S-* itself makes this clear. 27 I. & N. Dec. at 519 (reversing bond order and  
 25 ordering the respondent re-detained unless the Department of Homeland Security (DHS) grants  
 26 parole). Defendants have recently subjected other noncitizens to re-detention based on similar

changes in law. *See, e.g., Meza v. Bonnar*, No. 18-cv-02708-BLF, 2018 WL 2151877, at \*1, \*3 (N.D. Cal. May 10, 2018) (granting temporary restraining order to prevent re-detention where the BIA vacated a bond granted prior to *Jennings*); *see also id.* at \*3 (citing evidence that “following *Jennings*, other non-citizens have been re-detained”). Thus Plaintiffs continue to face re-detention and may challenge *Matter of M-S-*.

Second, even assuming that Plaintiffs’ release on bond mooted their individual detention claims, the certified Bond Hearing Class can pursue Plaintiffs’ due process claim to a constitutionally adequate bond hearing. *See* Dkt. 102 at 2, 4; *see also* Dkt. 26 ¶¶ 5-7, 148 (alleging Plaintiffs’ have right to “a bond hearing that is fair and comports with due process”). As the Ninth Circuit has explained:

[I]f the district court has certified a class, mooting the putative class representative’s claim will not moot the class action. That is so because upon certification the class “acquire[s] a legal status separate from the interest asserted by [the class representative],” so that an Article III controversy now exists “between a named defendant and a member of the [certified] class . . . .” *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011) (quoting *Sosna v. Iowa*, 419 U.S. 393, 399, 402 (1975)). Here, there is no question that if *Matter of M-S-* takes effect on July 15, it will immediately deprive future class members of their right to a bond hearing. Thus, the Bond Hearing Class maintains live detention claims. Moreover, current class members who have been released on bond will be subject to re-detention, should Defendants change their minds on this issue. Thus, this Court should reject Defendants’ mootness arguments.

## **II. Bond Hearing Class Has Stated a Due Process Claim to a Prompt Bond Hearing.**

### **A. Plaintiffs Have Due Process Rights.**

Defendants once again assert that, because Plaintiffs have only been in the United States for a brief period after entering the country, they lack due process rights. Dkt. 136 at 7-8. This Court has already rejected this argument. *See* Dkt. 91 at 9-10; Dkt. 110 at 6-7. Defendants ignore the long-established principle that individuals who have entered the country have due process rights: “once [a noncitizen] enters the country, the legal circumstance changes, for the Due

1 Process Clause applies to all ‘persons’ within the United States, including [noncitizens], whether  
 2 their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S.  
 3 678, 693 (2001); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (due process protects every  
 4 person within the United States, “[e]ven one whose presence in this country is unlawful,  
 5 involuntary, or transitory”); Dkt. 131 at 6-7 (citing additional cases). *Thuraissigiam v. U.S. Dep’t*  
 6 *of Homeland Sec.*, 917 F.3d 1097, 1111 n.15 (9th Cir. 2018) (“[P]resence matters to due  
 7 process.”).

8 This principle applies regardless of how long individuals have been present or the nature  
 9 of their entry. Indeed, the Ninth Circuit has routinely applied this rule to noncitizens who only  
 10 recently entered. *See, e.g., Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1153, 1160-62 (9th Cir.  
 11 2004) (due process for noncitizen apprehended same day as unlawful entry); *Jie Lin v. Ashcroft*,  
 12 377 F.3d 1014 (9th Cir. 2004) (requiring due process for child found alone in international  
 13 airport); *Padilla-Agustin v. INS*, 21 F.3d 970, 972, 974-77 (9th Cir. 1994) (requiring due process  
 14 for noncitizen apprehended shortly after crossing border), *abrogated on other grounds by Stone*  
 15 *v. INS*, 514 U.S. 386 (1995); Dkt. 131 at 7 (citing additional cases).

16 Defendants cite language from a hodgepodge of cases to try to undermine this long-  
 17 established rule, *see* Dkt. 136 at 7-8, but those cases are distinguishable. Each involved  
 18 noncitizens who, unlike Plaintiffs, had not effected an entry into the United States. To the  
 19 contrary, those cases reaffirm that the Due Process Clause protects all those who have entered,  
 20 even those who have entered illegally. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S.  
 21 206, 212 (1953); *Barrera v. Rison*, 44 F.3d 1441, 1448-49 (9th Cir. 1995); Dkt. 91 at 8-9  
 22 (distinguishing *Mezei* and *Barrera*). Nor did *Jennings* cast doubt on this principle, as Defendants  
 23 claim. *See* Dkt. 136 at 8. *Jennings* simply noted—without deciding the issue—that noncitizens  
 24 arriving at ports of entry may lack a due process right to a bond hearing. *See* 138 S. Ct. at 852.

25 Defendants also invoke *Castro v. U.S. Department of Homeland Security*, 835 F.3d 422  
 26 (3d Cir. 2016). But the Ninth Circuit has rejected *Castro* as contrary to Supreme Court and Ninth

1 Circuit law. *Thuraissigiam*, 917 F.3d at 1112 n.15 (“[W]e disagree with . . . *Castro*’s conclusion  
2 that a person [who has entered the United States] lacks all procedural due process rights.”).

3 Defendants’ reliance on *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), is also misplaced,  
4 as there, the Court *expanded* the due process rights of arriving noncitizens at ports of entry who  
5 could show a substantial connection to the country. *See* Dkt. 136 at 7. Defendants also rely on  
6 language quoted completely out of context from *United States v. Verdugo-Urquidez*, 494 U.S.  
7 259 (1990). Dkt. 136 at 8. Yet *Verdugo* involved whether the Warrant Clause of the Fourth  
8 Amendment applied *in Mexico* and has no application here. *See* 494 U.S. at 262-63.

9 Finally, contrary to Defendants’ assertions, Plaintiffs challenge the lack of procedures  
10 relating to their detention, not their admission. *See* Dkt. 136 at 7-8. Mere release from detention  
11 does not constitute an “admission” under the immigration laws. *Cf. Ortega-Cervantes v.*  
12 *Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007) (holding that an individual released from  
13 detention on “conditional parole” is not “paroled into the United States” for immigration  
14 purposes). For similar reasons, the government’s reliance on the political branches’ plenary  
15 power over immigration is unavailing. The plenary power cases primarily concern the power to  
16 expel or exclude noncitizens—not the power to imprison them. Thus, those cases are  
17 inapplicable here, as the power to subject people to arbitrary detention is not within the  
18 government’s “plenary” power. In any event, “[the plenary] power is subject to important  
19 constitutional limitations.” *Zadvydas*, 533 U.S. at 695.

## 20 **B. Plaintiffs Have a Due Process Right to a Bond Hearing.**

21 Plaintiffs have stated a due process claim for a bond hearing upon which relief can be  
22 granted. *See* Dkt. 130 ¶¶ 117-29. As demonstrated below, Plaintiffs are entitled to a bond hearing  
23 on both substantive and procedural due process grounds. Defendants argue that this Court should  
24 apply a presumption of constitutionality to the detention provisions of the Immigration and  
25 Nationality Act (INA). *See* Dkt. 136 at 7. However, such a presumption is at odds with the  
26 federal courts’ traditional exercise of *de novo* habeas corpus review to determine if detention is

1 “in violation of the Constitution.” 28 U.S.C. § 2241(c)(3). Indeed, courts carry out “the historic  
2 purpose of the writ, namely, to relieve detention by executive authorities without judicial trial.”  
3 *Zadvydas*, 533 U.S. at 699 (internal quotation marks omitted).

4 1. Substantive Due Process Requires a Bond Hearing.

5 “Freedom from imprisonment—from government custody, detention, or other forms of  
6 physical restraint—lies at the heart of the liberty” protected by the Due Process Clause. *Id.* at  
7 690. The Supreme Court in *Zadvydas* affirmed the due process requirement that immigration  
8 detention, like all civil detention, is justified only “where a special justification . . . outweighs the  
9 ‘individual’s constitutionally protected interest in avoiding physical restraint.’” *Id.* (quoting  
10 *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)); *see also United States v. Salerno*, 481 U.S. 739,  
11 747 (1987) (substantive due process prohibits detention that is “excessive in relation to [the  
12 government’s] regulatory goal”). The only legitimate justifications for immigration detention are  
13 to effectuate removal and to protect against danger and flight risk during that process. *Zadvydas*,  
14 533 U.S. at 690-91. Immigration detention violates due process unless it is reasonably related to  
15 these legitimate purposes. *See id.* at 690; *see also Hernandez v. Sessions*, 872 F.3d 976, 990 (9th  
16 Cir. 2017). Moreover, detention must be accompanied by adequate procedural safeguards to  
17 ensure that these purposes are served. *See Zadvydas*, 533 U.S. at 690-92; *Hernandez*, 872 F.3d at  
18 990.

19 As a consequence of Defendants’ elimination of bond hearings in *Matter of M-S-*, the  
20 only procedure available to Plaintiffs to challenge their detention is a discretionary parole  
21 determination made by a DHS officer. Dkt. 130 ¶ 54. However, with only one exception—  
22 *Demore v. Kim*, 538 U.S. 510 (2003), a case which is clearly distinguishable—the Supreme  
23 Court has never upheld civil detention as constitutional without an individualized hearing before  
24 a neutral decision maker, to ensure continued detention is justified. *See, e.g., Salerno*, 481 U.S. at  
25 750; *Hendricks*, 521 U.S. at 357-58; *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992); *Schall v.*  
26 *Martin*, 467 U.S. 253, 277, 279-81 (1984); *see also* Dkt. 131 at 9.

Although the Supreme Court upheld immigration detention without a hearing in *Demore*, that case is clearly distinguishable. First, the statute at issue in *Demore* imposed mandatory detention on certain noncitizens that Congress determined to pose a categorical bail risk because they had committed specific crimes. *See* 8 U.S.C. § 1226(c). The Court emphasized that this “narrow detention policy,” 538 U.S. at 526, was reasonably related to the government’s purpose of effectuating removal and protecting public safety, *id.* at 527-28. By contrast, the detention statute here applies broadly to individuals with no criminal records and with *bona fide* claims to protection in the United States. *Cf. Zadvydas*, 533 U.S. at 691 (doubting constitutionality of detention statute that “does not apply narrowly to ‘a small segment of particularly dangerous individuals,’ . . . but broadly to [noncitizens] ordered removed for many and various reasons” (citation omitted)).

Second, the *Demore* Court placed great reliance on the voluminous record before Congress. That evidence showed that the “criminal aliens” targeted by the mandatory detention statute posed a heightened categorical risk of flight and danger to the community. *See* 538 U.S. at 518-21 (citing studies and congressional findings). In contrast, Congress made no such findings regarding the population at issue here—that is, individuals who DHS has determined to have a credible fear of persecution or torture.

Third, the *Demore* Court strongly emphasized what it understood to be the brief period of time that mandatory detention typically lasts. *See id.* at 530 (noting that detention under § 1226(c) lasted “roughly a month and half in the vast majority of cases . . . and about five months in the minority of cases in which the [noncitizen] chooses to appeal”). In contrast, class members here may spend months or years in detention while their claims are adjudicated. Dkt. 130 ¶ 54.

## 2. Procedural Due Process Requires an Individualized Bond Hearing.

For many of the same reasons, procedural due process likewise requires individualized bond hearings before an IJ. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, Plaintiffs

1 have a profound interest in preventing their arbitrary detention. *See Zadvydas*, 533 U.S. at 690;  
 2 *see also Hernandez*, 872 F.3d at 993; Dkt. 110 at 6; *supra* Section II.B.1.

3 Second, the parole process creates an unacceptable risk of the erroneous deprivation of  
 4 Plaintiffs' liberty. The parole process consists merely of a custody review conducted by low-  
 5 level ICE detention officers. *See* 8 C.F.R. § 212.5(a). It includes no hearing before a neutral  
 6 decision maker, no record of any kind, and no possibility for appeal. *See generally id.* § 212.5(a)-  
 7 (d). Instead, ICE officers make parole decisions by merely checking a box on a form that  
 8 contains no factual findings, no specific explanation, and no evidence of deliberation. *See, e.g.,*  
 9 *Abdi*, 280 F. Supp. 3d at 404-05; *Damus v. Nielsen*, 313 F. Supp. 3d 317, 324-25, 341 (D.D.C.  
 10 2018).

11 Finally, the government lacks any countervailing interest in denying Plaintiffs' bond  
 12 hearings, as it has no legitimate interest in detaining individuals who pose no flight risk or  
 13 danger to the community. *See* Dkt. 110 at 15 (quoting *Hernandez*, 872 F.3d at 994). The only  
 14 other possible factor, administrative cost, is negligible, as the government has provided bond  
 15 hearings to asylum seekers pursuant to *Matter of X-K-* for more than a decade, and more  
 16 generally to noncitizens who have entered the United States for nearly the past 50 years.  
 17 Dkt. 131 at 2-3. In addition, the government itself has an interest in maintaining bond hearings  
 18 and ensuring accurate custody determinations. *See, e.g., Matter of X-K-*, 23 I. & N. Dec. at 736.

### 19 3. Defendants' Other Due Process Arguments Lack Merit.

20 Defendants other arguments as to why Plaintiffs have no due process right to a bond  
 21 hearing should be rejected. First, Defendants assert that the Supreme Court and Ninth Circuit  
 22 cases have affirmed that due process permits Defendants to detain Plaintiffs for at least six  
 23 months without a bond hearing. Dkt. 136 at 9-11 (citing *Zadvydas*, *Demore*, and *Rodriguez v.*  
 24 *Robbins*, 804 F.3d 1060 (9th Cir. 2015)). But none of the cited cases addressed the constitutional  
 25 issue presented here: whether it violates the Due Process Clause to detain Plaintiffs—individuals  
 26 who have entered the United States and been found to have *bona fide* asylum claims—without a

1 bond hearing for *any* period of time. Nor did the Supreme Court and Ninth Circuit hold that  
 2 constitutional concerns only arise at the six-month mark, as Defendants claim. *See* Dkt. 136 at  
 3 11. Instead, the cases affirm that due process requires immigration detention to be reasonably  
 4 related to a valid government purpose and accompanied by adequate procedures to ensure those  
 5 goals are served. *See Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 527; *Rodriguez*, 804 F.3d  
 6 at 1076-77.

7 Second, Defendants argue that, as in *Demore*, detention without a bond hearing is  
 8 constitutional because it serves the government’s valid purpose of ensuring Plaintiffs’ presence  
 9 at removal proceedings. *See* Dkt. 136 at 9-10. But *Demore* is clearly distinguishable for the  
 10 reasons set forth above. *See supra* p. 9.

11 Third, Defendants argue that *Zadvydas* does not apply because unlike in *Zadvydas*, where  
 12 the petitioners were subject to indefinite detention because the government could not execute  
 13 their deportation orders, Plaintiffs’ detention has a “definite termination point.” *See* Dkt. 136 at  
 14 10-11. According to Defendants, that termination point is the conclusion of Plaintiffs’ removal  
 15 cases, at which point class members will be released or removed. *Id.* But in contrast to the  
 16 petitioners in *Zadvydas*, Plaintiffs do not assert a due process right to *release* from detention on  
 17 the theory that their detention is no longer in service of their removal. Instead, they argue that  
 18 due process requires a basic *hearing* to ensure that their continuing imprisonment is justified.

19 Finally, Defendants assert that Plaintiffs can “end their own detention” by acquiescing in  
 20 deportation. Dkt. 136 at 10. This argument is absurd. DHS has determined that Plaintiffs have a  
 21 credible fear of persecution, which gives them the right to remain in the United States while they  
 22 seek protection. Plaintiffs should not be required to voluntarily end their detention by returning  
 23 to the countries from which they fled persecution, torture, or even death. *See* Dkt. 110 at 9 (“The  
 24 Constitution does not require these Plaintiffs to endure such a no-win scenario.”).

### 25 **C. Due Process Also Requires That the Hearing Be Promptly Afforded.**

26 The Due Process Clause not only requires an individualized hearing, but also dictates that

1 Plaintiffs receive prompt hearings—as this Court has already made clear. Dkt. 91 at 13-14; Dkt.  
 2 110 at 7, 13-14, 19. Defendants contend that due process is “a flexible concept,” Dkt. 136 at 9,  
 3 and thus cannot require a seven-day deadline, *id.* at 8-12. However, agency guidance and case  
 4 law from the immigration and civil detention contexts support Plaintiffs’ request.

5 First, agency regulations and case law from the immigration context have repeatedly  
 6 stated that bond hearings must be conducted in an expedited fashion, in recognition of Plaintiffs’  
 7 liberty interests. *See* Dkt. 91 at 13-14; Dkt. 110 at 13-14 (relying in part on agency case law and  
 8 guidance to deny Defendants’ motion to dismiss and issue preliminary injunction imposing  
 9 deadline for bond hearings). Similarly, as this Court has observed, “further guidance is found in  
 10 the Congressional mandate” to review credible fear determinations quickly. Dkt. 110 at 13; *see*  
 11 also 8 U.S.C. § 1225(b)(1)(B)(iii)(III). *Saravia v. Sessions*, 905 F.3d 1137 (9th Cir. 2018),  
 12 further demonstrates that Plaintiffs have stated a claim for a prompt hearing. In that case, the  
 13 Ninth Circuit affirmed a district court’s decision to impose a seven-day deadline to hold hearings  
 14 for immigrant minors that DHS re-arrests following their previous release. 905 F.3d at 1143.  
 15 Defendants seek to distinguish that decision, asserting the class members in *Saravia* are  
 16 differently situated from Plaintiffs and not subject to mandatory detention. Dkt. 136 at 12. Their  
 17 arguments fail to acknowledge that Plaintiffs have *bona fide* claims for asylum and if they  
 18 prevail, to eventually become lawful permanent residents—strengthening their interests in  
 19 obtaining a prompt hearing. *See* 8 U.S.C. §§ 1158(a)(1), 1159(b). Additionally, there is no  
 20 question that they are entitled to due process rights that protect their liberty interests. *See supra*  
 21 Section II.A. The *Saravia* timeline is therefore appropriate for Plaintiffs.

22 Second, pre-trial and civil detention cases support Plaintiffs’ claim. *See, e.g., Cty. of*  
 23 *Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir.  
 24 1981). Defendants attempt to distinguish *Gallinot* by pointing out that it involved a citizen and  
 25 the mental health context, Dkt. 136 at 12, but once again, Plaintiffs have demonstrated they are  
 26 entitled to due process regarding their liberty. *Supra* Section II.A-B; *see also* Dkt. 110 at 13

1 (relying, *inter alia*, on *Gallinot* to require Defendants to provide prompt bond hearings).

2 This Court has also rejected Defendants’ argument that Plaintiffs’ request for a prompt  
 3 hearing is “not suitable to class consideration” because due process inquiries are “flexible.” Dkt.  
 4 136 at 9; *see also* Dkt. 102 at 6. But Defendants’ apparent alternative—that class members  
 5 should each seek individual relief—“border[s] on the cynical,” Dkt. 102 at 12, as “[t]he bare  
 6 existence of optional habeas corpus review does not, of itself, alleviate due process concerns,”  
 7 *Gallinot*, 657 F.2d at 1023. To the contrary, the “protection [of habeas corpus] is illusory when a  
 8 large segment of the protected class cannot realistically be expected to set the proceedings into  
 9 motion in the first place.” *Id.* In addition, each of the civil detention cases cited above  
 10 demonstrate that courts—including the Supreme Court—have long been willing to impose  
 11 deadlines for custody hearings to protect liberty rights in the civil or pre-trial detention context.

12 Second, *Zadvydas* and *Demore* do not foreclose a “prompt” bond hearing. As noted  
 13 above, Plaintiffs do not assert a due process right to *release*, but only that due process requires a  
 14 basic *hearing* to ensure that their continuing imprisonment remains justified, as required by  
 15 *Zadvydas*. And in *Demore* the Court permitted a “narrow [mandatory] detention policy,” 538  
 16 U.S. at 526, only for the “brief” window of removal proceedings for certain noncitizens who  
 17 have committed a statutorily enumerated crime, *id.* at 513. *See* 8 U.S.C. § 1226(c). In fact,  
 18 available data suggests that alternatives to detention mitigate, and nearly eliminate, much of the  
 19 government’s interest in using detention to prevent flight risk. *See Hernandez*, 872 F.3d at 991  
 20 (citing data on high attendance rates for one of ICE’s alternatives-to-detention programs).

### 21 **III. Plaintiffs Have Stated a Statutory Claim to a Bond Hearing.**

#### 22 **A. Plaintiffs Have Stated a Claim to a Bond Hearing under Section 1226(a).**

23 Defendants’ elimination of bond hearings also violates the INA. In *Matter of M-S-*, the  
 24 Attorney General relied on the Supreme Court’s language in *Jennings*, indicating that 8 U.S.C.  
 25 § 1225(b)(1)(B)(ii) imposes mandatory detention throughout the proceedings. 27 I. & N. at 510  
 26 (quoting *Jennings*, 138 S. Ct. at 844-45). But *Jennings* did not address claims brought by the

1 class of asylum seekers at issue here, who were apprehended after they entered and were  
 2 subjected to expedited removal pursuant to § 1225(b)(1)(A)(iii). Rather, the class certified in  
 3 *Jennings* included only individuals who were classified as “arriving” pursuant to 8 U.S.C. §  
 4 1225(b). That class argued primarily that they were entitled to bond hearings after they had faced  
 5 six months of prolonged detention, since unlike the Plaintiffs here, the regulations excluded this  
 6 class from entitlement to bond hearings. 8 C.F.R. § 1003.19(h)(2)(i)(B); *see also* Brief for  
 7 Respondents at 2-3, *Jennings*, 138 S. Ct. 830 (No. 15-1204). Indeed, in *Jennings*, the government  
 8 acknowledged that noncitizens who entered without inspection and were later found to have a  
 9 credible fear of persecution were not part of the § 1225(b) subclass because such individuals  
 10 “were detained under regulations implementing Section 1226(a), not Section 1225(b).” Brief for  
 11 Petitioners at 18 n.5, *Jennings*, 138 S. Ct. 830 (No. 15-1204). Thus, in issuing the *Jennings*  
 12 decision, the Supreme Court did not purport to address the claims of the Bond Hearing class  
 13 members in this case.

14 Contrary to Defendants’ argument, *see* Dkt. 136 at 14-15, reading § 1225(b)(1)(B)(ii) to  
 15 require mandatory detention for individuals who have entered without inspection (EWI)  
 16 throughout their asylum proceedings creates significant tension with § 1225(b)(1)(B)(iii)(IV),  
 17 which explicitly requires mandatory detention only “pending a final determination of credible  
 18 fear of persecution and, if found not to have such a fear, until removed.”

19 Moreover, EWI asylum seekers can be and sometimes are placed directly into removal  
 20 proceedings under 8 U.S.C. § 1229a rather than passing through the credible fear process. Thus,  
 21 the Attorney General’s interpretation creates arbitrary and capricious results, as an asylum  
 22 seeker’s right to a bond hearing would hinge upon a DHS official’s discretionary determination  
 23 on whether to place the asylum seeker directly into § 1229a proceedings or first pass her through  
 24 a credible fear screening process under § 1225(b). *Cf. Judulang v. Holder*, 565 U.S. 42, 55  
 25 (2011) (“A method for disfavoring deportable [noncitizens] that bears no relation to these  
 26 matters—that neither focuses on nor relates to [a noncitizen’s] fitness to remain in the country—

1 is arbitrary and capricious.”); *id.* at 75 (“[T]he outcome of the Board’s comparable-grounds  
2 analysis itself may rest on the happenstance of an immigration official’s charging decision.”).

3 Courts must read a statute to avoid serious constitutional problems when it is “fairly  
4 possible” to do so. *Zadvydas*, 533 U.S. at 689; *see also Clark*, 543 U.S. at 381 (the constitutional  
5 avoidance canon “is a tool for choosing between competing plausible interpretations of a  
6 statutory text, resting on the reasonable presumption that Congress did not intend the alternative  
7 which raises serious constitutional doubts”). In particular, courts have consistently “read  
8 significant limitations into other immigration statutes in order to avoid their constitutional  
9 invalidation.” *Zadvydas*, 533 U.S. at 689. As explained above, the detention of Plaintiffs without  
10 a prompt individualized hearing before a neutral adjudicator raises serious due process concerns.  
11 *See supra*, Section II.A-C. Accordingly, the Court should interpret the statute to require bond  
12 hearings for class members under § 1226(a). Dkt. 130 ¶ 134.

13 **B. Plaintiffs Have Stated a Claim to a Bond Hearing under Section 1182(d)(5).**

14 Defendants’ elimination of individualized custody hearings also violates the INA for a  
15 second reason. Both *Jennings* and *Matter of M-S-* recognize that the INA allows Plaintiffs to  
16 seek release on parole. *Jennings*, 138 S. Ct. at 844 (citing 8 U.S.C. § 1182(d)(5)(A)); *Matter of*  
17 *M-S-*, 27 I. & N. Dec. at 516-17 (same). Implementing regulations for § 1182(d)(5) provide that  
18 DHS must exercise its parole discretion on a “case-by-case basis” and that it may parole  
19 individuals who “present neither a security risk nor a risk of absconding,” 8 C.F.R. § 212.5(b),  
20 and “whose continued detention is not in the public interest,” *id.* § 212.5(b)(5); *see also id.*  
21 § 235.3(c). Although DHS and the former Immigration and Naturalization Service (INS) have  
22 traditionally exercised the parole authority without IJ review, the parole statute itself is *silent* as  
23 to the procedure for parole reviews.

24 As noted above, courts must construe a statute to avoid due process concerns where it is  
25 “fairly possible” to do so, *Zadvydas*, 533 U.S. at 689, as is the case here. *See supra* Section II.A-  
26 C. Thus, the parole statute can and should be read to provide an individualized hearing before an

1 II. Indeed, the government itself previously recognized that the statute can be construed to allow  
 2 for II review of parole decisions. Memorandum from Paul W. Virtue, U.S. Dep't of Justice, INS,  
 3 to INS officials, Authority to Parole Applicants for Admission Who Are Not Also Arriving  
 4 Aliens, Legal Op. No. 98-10, 1998 WL 1806685, at \*2 (Aug. 21, 1998) ("The statute itself does  
 5 not forbid delegation of the parole authority to officials who are not Service officers.").

6 Defendants incorrectly argue that *Jennings* forecloses Plaintiffs' interpretation of 8  
 7 U.S.C. § 1182(d)(5). *See* Dkt. 136 at 15. First, *Jennings* did not construe the parole statute or  
 8 consider whether the parole process in place comports with due process. Moreover, the Court's  
 9 statement that "there are no *other* circumstances" than parole that provide for release of  
 10 noncitizens detained under § 1225(b), 138 S. Ct. at 844, did not address the *procedures* by which  
 11 Defendants must administer the statutory parole standard. Second, Plaintiffs' interpretation is  
 12 consistent with *Jennings*' explanation of the canon of constitutional avoidance. *Jennings*  
 13 contrasted the mandatory language of § 1225(b)(2) ("shall be detained") with the discretionary  
 14 language of § 1231(a)(6) ("may be detained"). *See id.* at 844-45. *Jennings* reaffirmed the Court's  
 15 prior holding in *Zadvydas* that the term "[m]ay" . . . 'suggests discretion' but not necessarily  
 16 'unlimited discretion. In that respect the word 'may' is ambiguous.'" *Jennings*, 138 S. Ct. at 843  
 17 (quoting *Zadvydas*, 533 U.S. at 697). Thus, the parole statute's use of the term "may" means that  
 18 "*Zadvydas*'s reasoning may fairly be applied in this case." *Jennings*, 138 S. Ct. at 843.

19 Defendants also suggest that 8 U.S.C. § 1252(a)(2)(B)(ii) eliminates jurisdiction over  
 20 Plaintiffs' claim. Dkt. 136 at 16. That section, entitled "Denials of discretionary relief," provides  
 21 that no court has jurisdiction over a "decision or action . . . the authority for which is specified  
 22 under this subchapter to be in the discretion of the Attorney General or the Secretary of  
 23 Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). But that statute does not preclude "purely  
 24 legal" challenges, "as they do not turn on discretionary judgement." *Kwai Fun Wong v. United*  
 25 *States*, 373 F.3d 952, 963 (9th Cir. 2004) (collecting cases). Plaintiffs' claim is such a pure legal  
 26 challenge.

**IV. Plaintiffs Have Stated a Claim Under the APA.**

The APA expressly requires notice and an opportunity to comment prior to agency decisions to amend or repeal a rule. The statute defines “rule making” to mean “agency process for formulating, *amending, or repealing* a rule.” 5 U.S.C. § 551(5) (emphasis added). The APA also requires that a notice of proposed rulemaking shall be published in the Federal Register; that there be at least a 30-day period between notice and effective date; and that interested persons be given an opportunity to participate. 5 U.S.C. § 553(b)-(d).

Defendants argue that the Attorney General’s decision to eliminate bond hearings in *Matter of M-S-* was a permissible act of policymaking through adjudication, and thus exempt from notice-and-comment. Dkt. 136 at 16-17. But the existing regulations, 8 C.F.R. §§ 1236.1(d) and 1003.19(h)(2)(i), themselves provide Plaintiffs with a bond hearing. An agency, of course, has discretion to “elect between rulemaking and ad hoc adjudication to carry out its mandate.” *Yang v. I.N.S.*, 79 F.3d 932, 936 (9th Cir. 1996). However, once an agency has promulgated a regulation, the agency is bound by that regulation. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (agency must comply with its own regulations when the rights of individuals are at stake). Moreover, if Defendants wish to *amend* that regulation, it must do so through rulemaking proceedings, and not through ad hoc adjudication. *See Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (explaining that the APA “mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance”). For this reason, all the cases cited by Defendants, Dkt. 136 at 17-18, are inapposite, as none addresses Plaintiffs’ argument that the agency has already bound itself to address the availability of bond hearings through rulemaking.

As the BIA explained in *Matter of X-K-*, the existing regulations entitle Plaintiffs to bond hearings. 23 I. & N. Dec. at 731-32, 734-35. Specifically, the regulations give IJs general authority to hold bond hearings for individuals in removal proceedings, at any time prior to the entry of a final order of removal, except for specifically excluded classes of noncitizens. *See* 8

1 C.F.R. § 1236.1(d). 8 C.F.R. § 1003.19(h)(2)(i), in turn, exempts specific classes of individuals  
 2 from the IJ's general custody jurisdiction. Critically, that list does not include Plaintiffs—  
 3 namely, persons who (1) entered without inspection, (2) were subjected to expedited removal,  
 4 and (3) passed a credible fear screening.

5 The regulatory history reinforces the plain meaning of § 1003.19(h)(2)(i). Initially, the  
 6 agency proposed *eliminating* IJ jurisdiction over bond hearings for EWIs. *See* Inspection and  
 7 Expedited Removal of Aliens, 62 Fed. Reg. 444, 483 (Jan. 3, 1997) (providing that that “an  
 8 immigration judge may not exercise authority” over bond for “inadmissible aliens in removal  
 9 proceedings,” which would include EWIs). However, the agency *deleted* that language from the  
 10 final rule, thereby maintaining IJ bond jurisdiction over EWIs. *See* 8 C.F.R. § 1003.19(h)(2)(i);  
 11 *see also* Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 No. 5  
 12 Interpreter Releases 209, 215 (Feb. 3, 1997) (discussing regulatory history).

13 The government cannot waive its rulemaking obligations by claiming that the regulations  
 14 were void *ab initio*. As the D.C. Circuit has explained:

15 The . . . argument that notice and comment requirements do not apply to  
 16 “defectively promulgated regulations” is untenable because it would permit  
 17 an agency to circumvent the requirements of § 553 merely by confessing  
 18 that the regulations were defective in some respect and asserting that  
 modification or repeal without notice and comment was necessary to correct  
 the situation.

19 *Consumer Energy Council v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 447 n.79 (D.C.  
 20 Cir. 1982); *see also Nat’l Treasury Emps. Union v. Cornelius*, 617 F. Supp. 365, 371 (D.D.C.  
 21 1985) (“It would significantly erode the usefulness of the APA if agencies were permitted  
 22 unilaterally to repeal regulations dealing with the substantive rights of individuals under federal  
 23 statutes, by declaring that the earlier regulations were just a mistake.”).

24 Moreover, rulemaking here would serve a useful purpose. In deciding *Jennings*, the  
 25 Supreme Court expressly declined to consider the due process implications of its ruling. *See* 138  
 26 S. Ct. at 851 (limiting its holding to statutory questions and remanding to court of appeals to  
 address the constitutional issues “in the first instance”). A rulemaking process would thus give

the public the opportunity to propose, and the agency the opportunity to consider, alternative ways of implementing the INA to ameliorate the constitutional problems mandatory detention presents—for example, by construing the parole authority to require a hearing before an IJ. *Cf.* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,968 (Nov. 14, 2001) (amending the custody review process for individuals detained after receiving a final order of removal in light of constitutional concerns addressed in *Zadvydas v. Davis*, 533 U.S. 678 (2001)); *id.* at 56,974 (construing statute to require hearing before immigration judge for certain noncitizens that DHS seeks to detain despite being unable to execute those noncitizens’ removal orders). Defendants suggest that notice and comment rulemaking would serve no purposes here because amicus briefs were presented to the Attorney General pending his consideration of *Matter of M-S-*. Dkt. 136 at 17-18. However, there is no requirement that the Attorney General consider the arguments presented by amicus briefing. In contrast, in notice and comment proceedings, the AG’s failure to “respond to ‘significant’ comments” is subject to judicial review and, if arbitrary and capricious, rescission of the rule. *Am. Mining Cong. v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992).

## **V. Plaintiffs Are Entitled to Prompt Credible Fear Interviews.**

### **A. Plaintiffs Have a Due Process Right to a Prompt Credible Fear Interview.**

Defendants have waived sovereign immunity over Plaintiffs’ constitutional claim to a prompt Credible Fear Interview (CFI) under 5 U.S.C. § 702, in conjunction with jurisdiction under 28 U.S.C. § 1331. Dkt. 130 ¶ 8; *see also* Dkt. 69 at 7. Section 702’s waiver is not limited to causes of action asserted under the APA. *See, e.g., Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 524-26 (9th Cir. 1989) (holding that Section 702 eliminated the sovereign immunity defense in suit asserting violation of constitutional rights). Moreover, the Court retains habeas jurisdiction over Plaintiffs’ claims under 28 U.S.C. § 2241, which permits review of challenges to protracted detention during the credible fear process. *See* Dkt. 130 ¶¶ 8, 37, 64, 74, 85, 94, 147-51. Regardless of this Court’s decision on Plaintiffs’ bond hearing claims, the CFI

delays that Plaintiffs challenge will prolong the period they remain detained before they can seek release on parole. *See, e.g., Damus*, 313 F. Supp. at 323-24 (describing parole process for individuals with positive credible fear determinations); *see also* Dkt. 69 at 10-12; Dkt. 98 at 6-9.

Notably, Defendants have previously raised this issue, *see* Dkt. 36 at 8-9, and this Court has rejected it, *see* Dkt. 91 at 7-8 (explaining that “[i]t is now clear that [a] federal district court has habeas jurisdiction under 28 U.S.C. § 2241 to review’ complaints by detained [noncitizens] ‘for constitutional claims and legal error’” (first alteration in original) (quoting *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011))). This Court also has already rejected Defendants’ challenge to the merits of Plaintiffs’ constitutional claim to a timely credible fear interview, including that Plaintiffs lack due process rights to the protections that they seek. *See id.* at 8-10.

Contrary to Defendants’ assertions, *see* Dkt. 136 at 19-21, Plaintiffs enjoy due process protections, especially those who have “entered” the country albeit without inspection. *See, e.g., United States v. Raya-Vaca*, 771 F.3d 1195, 1202-03 (9th Cir. 2014). Moreover, they simply ask that the process Congress implemented for presenting persecution claims be fairly implemented. *See* 8 U.S.C. §§ 1225(b)(1)(A)(ii); 1225(b)(1)(B)(i); *see also Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996). Furthermore, *all* members of the CFI Class, by virtue of their status as asylum seekers, are entitled to certain minimum due process protections. *See, e.g., Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984); *cf. Angov v. Lynch*, 788 F.3d 893, 898 n.3 (9th Cir. 2015) (noting this is an “open question” in this circuit). Thus, Defendants may not unreasonably infringe upon Plaintiffs’ due process rights by unreasonably delaying credible fear interviews and prolonging their detention. *See also* Dkt. 69 at 15 (distinguishing cases cited by Defendants).

### **B. The Administrative Procedure Act (APA) Entitles Plaintiffs to a Prompt CFI.**

This Court previously dismissed Plaintiffs’ claim that the APA entitles them to prompt credible fear interviews. Dkt. 92 at 10-13. Plaintiffs include the claim in the TAC in order to preserve it for review.

**C. 8 U.S.C. § 1252(a)(2)(A)(iv) Does Not Bar Plaintiffs’ Prompt CFI Claims.**

This Court already has held that 8 U.S.C. § 1252(a)(2)(A)(iv) does not bar Plaintiffs’ credible fear claims, Dkt. 100 at 2, a challenge that Defendants now reiterate, *see* Dkt. 136 at 22-23. As Plaintiffs previously argued, the text of 8 U.S.C. § 1252(a)(2)(A)(iv) only bars challenges to “procedures and policies . . . *to implement* the provisions of section 1225(b)(1)” except as permitted by § 1252(e)(3) (emphasis added). *See* Dkt. 98 at 2-8. It therefore does not apply to Plaintiffs’ claims, as Plaintiffs challenge precisely the opposite: the agency’s *failure* to implement (or carry out) the process the statute’s system of timely credible fear interviews for noncitizens in expedited removal. Thus, this case falls into a well-established line of decisions recognizing that the INA’s jurisdiction-stripping provisions do not apply where DHS and its sub-agencies fail to comply with the governing statute or with their own policies implementing the statute. *See, e.g., Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1075 n.1 (D. Or. 2018) (finding that § 1252(a)(2)(A)(iv) does not bar review of lawsuit challenging “specific actions . . . that conflict with the very procedures and policies that Defendants . . . have adopted”); *cf.* Dkt. 98 at 5-6 (citing cases).<sup>1</sup>

Nor, as Defendants suggest, *see* Dkt. 136 at 22-23, do the limitations of § 1252(e) apply. In relevant part, § 1252(e) permits certain challenges otherwise barred by § 1252(a)(2)(A)(iv), but restricts such challenges to written policies and regulations implementing the expedited removal system and challenges to the validity of the system as a whole, brought in the District of Columbia within sixty days of first implementation. 8 U.S.C. § 1252(e)(3)(A)-(B). But applying that provision to challenges, like Plaintiffs’, that address Defendants’ failure to implement the statute would be absurd—because no statute, regulation or written procedure can trigger the statutory deadline for bringing a challenge to the *failure* to implement the required process. Any decision to the contrary would insulate Defendants’ actions from review. *See also* Dkt. 69 at 6.

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<sup>1</sup> The Court also maintains jurisdiction pursuant to the habeas statute, 28 U.S.C. § 2241, which affords Plaintiffs a basis to seek relief for their constitutional claim that the delay of their credible fear determinations prolongs their detention in violation of due process. *See supra* p. 20.

**VI. Section 1252(f)(1) Does Not Bar Classwide Injunctive Relief.**

Finally, § 1252(f)(1) does not limit this Court from granting classwide injunctive relief. As an initial matter, § 1252(f)(1) does not prohibit this Court from issuing classwide *declaratory* relief. *See Nielsen v. Preap* 139 S. Ct. 954, 962 (2019) (holding that “the District Court had jurisdiction to entertain the plaintiffs’ request for declaratory relief”); *accord Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018); *Rodriguez v. Hayes*, 591 F.3d 1105, 1119-20 (9th Cir. 2010). Nor does § 1252(f)(1) bar injunctive relief on Plaintiffs’ *statutory* claims, as both the Ninth Circuit and this Court have held. *See Hayes*, 591 F.3d at 1120; Dkt. 91 at 19 (same).

Furthermore, Defendants are incorrect that § 1252(f)(1) bars injunctive relief on Plaintiffs’ constitutional claims. As the Ninth Circuit explained in *Marin*, § 1252(f)(1) does not apply here for two reasons. In that case, the court specifically held that § 1252(f)(1) did not strip jurisdiction over the plaintiffs’ detention claims, but remanded for the district court to “decide in the first instance whether § 1252(f)(1) precludes classwide injunctive relief.” 909 F.3d at 256 n.1. The Ninth Circuit’s reasons for holding that § 1252(f)(1) did not strip jurisdiction over detention claims apply equally to any effect that § 1252(f)(1) has on remedial jurisdiction and compel the same result.

First, “[a]ll of the individuals in the . . . class are ‘individual[s] against whom [removal] proceedings . . . have been initiated.’” *Marin*, 909 F.3d at 256 (second alteration in original) (quoting § 1252(f)(1)). Pursuant to § 1252(f)(1), only persons already targeted for removal can seek injunctive relief, as opposed to those individuals who are not yet in removal proceedings. *Am. Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1360 (D.C. Cir. 2000) (“Congress meant to allow litigation challenging the new system by, and only by, *[noncitizens] against whom the new procedures had been applied.*” (emphasis added)). Congress adopted § 1252(f)(1) after a period in which organizations and classes of individuals who were not in removal proceedings repeatedly brought preemptive challenges to the enforcement of certain immigration statutes. *E.g., Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993) (class action brought by,

1 *inter alia*, immigrant rights’ organizations and class of individuals, many of whom were not in  
 2 deportation proceedings); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 487-88 (1991)  
 3 (same by, *inter alia*, refugee services organizations and class of individuals, only some of whom  
 4 were in proceedings); *Haitian Refugee Ctr., Inc. v. Smith*, 676 F.2d 1023, 1029 (5th Cir. Unit B  
 5 1982) (class of, *inter alia*, individuals who applied for asylum but were not in proceedings).  
 6 Section 1252(f)(1) eliminates such challenges. By contrast, the Plaintiffs here satisfy  
 7 § 1252(f)(1)’s exception clause because all are “individual [noncitizens] against whom [removal]  
 8 proceedings . . . have been initiated.” 8 U.S.C. § 1252(f)(1).

9 Defendants seize upon *dicta* in *Reno v. American-Arab Anti-Discrimination Committee*  
 10 (“AADC”), 525 U.S. 471 (1999), to argue the reference to “an individual alien” bars all forms of  
 11 classwide injunctive relief. Dkt. 136 at 23 (citing AADC, 525 U.S. at 482; *Jennings*, 138 S. Ct. at  
 12 851). But AADC did not address § 1252(f)(1)’s exception clause. Nor did the Ninth Circuit in  
 13 *Marin* hold that *Reno* “likely forecloses” Plaintiffs’ claims for injunctive relief, as Defendants  
 14 claim. Dkt. 136 at 23. Instead, *Marin* simply noted that “*even if*” *Reno* forecloses injunctive  
 15 relief, declaratory relief remains available. 909 F.3d. at 256 (emphasis added). Moreover, courts  
 16 decline to construe references to “any individual” or “any plaintiff” as eliminating judicial  
 17 authority under Federal Rule of Civil Procedure 23. *See, e.g., Califano v. Yamasaki*, 442 U.S.  
 18 682, 700 (1979) (“The fact that the statute speaks in terms of an action brought by ‘any  
 19 individual’ . . . does not indicate that the usual Rule providing for class actions is not  
 20 controlling . . . . Indeed, a wide variety of federal jurisdictional provisions speak in terms of  
 21 individual plaintiffs, but class relief has never been thought to be unavailable under them.”);  
 22 *Brown v. Plata*, 563 U.S. 493, 531 (2011) (upholding classwide injunctive relief against a prison  
 23 despite provision stating “[p]rospective relief in any civil action with respect to prison conditions  
 24 shall extend no further than necessary to correct the violation of the Federal right of a particular  
 25 plaintiff or plaintiffs”) (citing 18 U.S.C. 3626(a)(1)(A)). Nor does *Marin*’s construction of §  
 26 1252(f)(1) render the term “individual” superfluous, as Defendants assert. Dkt. 136 at 23 (citing

1 *Hamama v. Adducci*, 912 F.3d 869, 877-78 (6th Cir. 2018)). Congress used “individual” to stop  
 2 organizational plaintiffs from pursuing injunctions on behalf of people not in removal  
 3 proceedings. *Supra* p. 23. *Marin*’s reading of the plain language thus effects Congress’s intent.

4 *Second*, § 1252(f)(1) also does not bar relief here “because it lacks a clear statement  
 5 repealing the court’s habeas jurisdiction.” *Marin*, 909 F.3d at 256. Plaintiffs invoke the Court’s  
 6 habeas corpus authority under 28 U.S.C. § 2241. Dkt. 130 ¶ 8. It is well established that courts  
 7 will not read a statute to restrict their power to grant habeas relief unless Congress explicitly  
 8 revokes authority under the general federal habeas statute—28 U.S.C. § 2241—by name. *INS v.*  
 9 *St. Cyr*, 533 U.S. 289, 314 (2001); *Demore*, 538 U.S. at 517. The same applies here, as §  
 10 1252(f)(1) does not expressly revoke authority to grant relief in habeas corpus cases; it is silent  
 11 on the subject. That inference is even stronger here, as after *St. Cyr*, Congress amended 8 U.S.C.  
 12 § 1252 to explicitly limit habeas jurisdiction in other portions of § 1252. *See, e.g.*, 8 U.S.C. §§  
 13 1252(a)(2)(B); 1252(b)(9).

14 Moreover, restricting federal courts’ power to resolve habeas cases “as law and justice  
 15 require,” 28 U.S.C. § 2243, would raise serious constitutional problems. Congress gave federal  
 16 courts authority to entertain habeas cases, including the power to order the release of federal  
 17 prisoners, in 1789. *See St. Cyr*, 533 U.S. at 305. In addition, under the Suspension Clause, “the  
 18 habeas court must have the power to order the conditional release of an individual unlawfully  
 19 detained.” *Boumediene v. Bush*, 553 U.S. 723, 779 (2008). Thus, § 1252(f) cannot be construed  
 20 to deprive federal courts of equitable authority in cases founded upon habeas jurisdiction.

## 21 CONCLUSION

22 For the foregoing reasons, the Court should deny Defendants’ motion to dismiss.

23 RESPECTFULLY SUBMITTED this 17th day of June, 2019.  
 24  
 25  
 26

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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And I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: None.

Dated: June 17, 2019.

s/ Aaron Korthuis

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